85-909 (1)

Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

MARION NAMENWIRTH

Petitioner

vs.

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Lee Cullen

Cullen, Weston & Pines
20 North Carroll St.
Madison, WI 53703
(608)251-0101

October, 1985

361

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

MARION NAMENWIRTH

Petitioner

vs.

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM

Respondent

The petitioner, Marion Namenwirth, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 6, 1985, affirming the denial of relief under 42 U.S.C. §2000(e), et seq., and that on hearing the judgment denying relief be reversed.

I. QUESTIONS PRESENTED

1. In a Title VII sex discrimination action, can the federal district and

appeals courts defer to the subjective judgment of a university faculty committee when deciding whether there was discrimination present in the assessment of qualifications of a candidate for tenure?

2. In a Title VII sex discrimination action, which alleges sex discrimination in the denial of tenure to a female college professor, has the plaintiff had a full and fair opportunity to demonstrate that the proffered reason for the denial is a pretext when the trial court fails to make any finding of fact about the comparative qualifications of the tenure candidates?

3. At the third stage of a Title VII sex discrimination action, is the standard of proof properly whether the employer's reason for the employment decision is "reasonable and not

arbitrary", or is it whether the employee has met her burden of showing that the proffered reason is pretext?

II. TABLE OF CONTENTS

	Page
I. QUESTIONS PRESENTED . .	1
II. TABLE OF CONTENTS . .	4
III. TABLE OF AUTHORITIES . .	5
IV. OPINIONS BELOW . . .	7
V. JURISDICTION . . .	8
VI. STATUTES INVOLVED . .	9
VII. STATEMENT OF THE CASE . .	10
VIII. REASONS FOR GRANTING THE WRIT	18
IX. CONCLUSION . . .	35

APPENDIX A

APPENDIX B

III. TABLE OF AUTHORITIES

1. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) . . .23

2. Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir.), cert. denied, 409 U.S. 982 (1972) 24

3. Carlile v. South Routt School District, 739 F.2d 1496, 1499 (10th Cir. 1984) 23

4. Chanee v. Board of Examiners, 458 F.2d 1167 (2d Cir., 1972) 24

5. Furnco Construction Corp. v. Waters, 435 U.S. 567, 577 (1978) 28, 32

6. Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir., 1980), cert. denied, 101 S.Ct. 3083 (1981) 24

7. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 355, fn. 15 (1977) 28

8. Kunda v. Muhlenberg College, 621 F.2d 532, 551 (3rd Cir., 1980) 23

9. Lynn v. Regents of the University of California, 656 F.2d 1337,1342 (9th Cir., 1980), cert. denied, 459 U.S. 823 (1982) 23

10. McDonnell-Douglas v. Green,
41 U.S. 792, 807 (1973)
. . . . 12, 28

11. Powell v. Syracuse University,
580 F.2d 1150,1153 (2nd Cir.),
cert. denied, 439 U.S. 984 (1978)
. . . . 22, 24

12. Rowe v. General Motors Corp.,
457 F.2d 348, 359 (5th Cir., 1972)
. . . . 24

13. Senter v. General Motors Corp.,
532 F.2d 511, 528, 30 (6th Cir.),
cert. denied, 429 U.S. 870 (1976)
. . . . 24

14. Smith v. Univeristy of North Carolina,
632 F.2d 316, 345 fn. 26 (4th Cir.,
1980) 23

15. Sweeney v. Board of Trustees,
604 F.2d 106, 108 (1st Cir. 1979),
cert. denied, 444 U.S. 1045 (1980)
. . . . 23, 24

16. Texas Department of Community Affairs
v. Burdine,
450 U.S. 248, 256 (1981)
. . . 25, 28, 29

17. U.S. Postal Service v. Aikens,
460 U.S. 711, 715 (1983)
. . 21, 23, 25, 28, 29

18. Watkins v. Scott Paper Co.,
530 F.2d 1159, 1188-90 (5th Cir.),
cert. denied, 429 U.S. 861 (1976)
. . . . 24

19. Whiting v. Jackson State University,
616 F.2d 116, 120-121 (5th Cir.,
1980) 23

IV. OPINIONS BELOW

The opinion of the Court of Appeals is reported at 769 F.2d 1235, and appears in Appendix A, attached hereto. The opinion of the District Court for the Western District of Wisconsin is not reported and appears in Appendix B, attached hereto.

V. JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 6, 1985. This petition for certiorari was filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. §1254(1).

VI. STATUTES INVOLVED

42 U.S.C. §2000e-2(a)(1):

> **(a) Employers.** It shall be an unlawful employment practice for an employer:
>
> **(1)** To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex or national origin.

VII. STATEMENT OF THE CASE

The petitioner, Marion Namenwirth, was denied tenure at the University of Wisconsin-Madison during the 1976-77 academic year by the Biological Divisional Committee, after she received a favorable recommendation from the Department of Zoology. She was the first woman in thirty-five (35) years to be considered for tenure in the Zoology Department, and the first person ever to be denied tenure in the department. After an appeal and reconsideration of the original decision, tenure was again denied by the Divisional Committee in October, 1978 and by the Dean of the College of Letters and Sciences in January, 1979. In May, 1979 a male colleague in the Zoology Department was granted tenure in the all-male department.

In July, 1979, the petitioner filed a complaint with the United States Department of Labor, which found that the petitioner has been denied tenure because of her sex.

The Labor Department concluded that a weak tenure recommendation from the Department of Zoology was the product of sex discrimination.

Marion Namenwirth brought an action in the District Court for the Western District of Wisconsin in October, 1983. She alleged that the tenure denial was the result of disparate treatment, and that she had suffered a deprivation of her rights under Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972, 42 U.S.C. §2000(e), et seq. The case was tried before a magistrate with the consent of the parties pursuant to 28 U.S.C. §636(c)(1). After trial, at which evidence was presented to prove discrimination by department members and their disparate treatment of the tenure candidates, both parties prepared numerous proposed findings of fact. The magistrate rejected most of the petitioner's proposed findings of fact

as "not genuinely material or relevant" (Appendix B, p. 2). The magistrate did not make a finding of fact on the comparative tenure qualifications of Marion Namenwirth and other male candidates who had been granted tenure from the same department.

The magistrate found that Ms. Namenwirth had discharged her burden of establishing a prima facie case of discrimination by showing that: 1) she is a member of a protected class; 2) she was qualified for tenure; 3) she was denied tenure; and 4) an applicant not in the protected class was granted tenure. McDonnell-Douglas v. Green, 41 U.S. 792, 807 (1973). The magistrate also found that the University had come forward at the second stage and rebutted the prima facie case by producing a legitimate, non-discriminatory reason for its action. This reason was that Ms. Namenwirth's research and research

potential were allegedly insufficient to meet the standard required for tenure.

The proceeding thus entered the third stage, where the petitioner had the burden of proving the proffered reason to be a pretext. However, rather than consider the petitioner's evidence on the comparative qualifications of tenure candidates both before and after her consideration, the magistrate set out to examine only "the defendant's evidence with the strictest scrutiny." The magistrate concluded that the denial of tenure was "a reasonable decision ... which I cannot reject as arbitrary" (Appendix B, pp. 25-26).

The petitioner appealed to the United States Court of Appeals for the Seventh Circuit. The case was argued on November 14, 1984 and was decided on August 6, 1985. On appeal, the petitioner argued that the magistrate should have considered comparative evidence of the qualifications

of tenure candidates; that it was the magistrate's duty to determine if the proffered reason was pretextual, and not to just examine the reasonableness of the decision; and that, on the facts, the magistrate's conclusion was clearly erroneous. The panel of the Court of Appeals decided for the respondent by a 2 to 1 vote.

The Appeals Court agreed with the petitioner that comparative evidence has an essential role in determining whether an employer's proffered reason is pretextual. However, the majority opinion stated that, because the magistrate had decided the employer's decision was "not arbitrary", he had considered the comparative evidence. "A motive that is applied in some cases and not in others ... is arbitrary, and we cannot imagine what the magistrate would have meant by the use of the word if he did not mean that the University's standards of excellence were applied to all equally"

(Appendix A, p. 11). Based on the magistrate's use of "not arbitrary", the Seventh Circuit majority concluded that the magistrate did consider the comparative evidence, despite his failure to include any evidence of this comparison in his findings of fact.

The opinion of the Court also agreed with petitioner that using a standard of "reasonable and not arbitrary" would be error, since it would not suffice to show that a proffered reason is not a pretext. This is because a reason can be "true and genuine" and still be used in a discriminatory way, as when a woman is denied tenure based on her credentials, while men with the same credentials are promoted (Appendix A, pp. 10, 11). Nonetheless, the majority relied on its conclusion that the magistrate had considered the comparative evidence, and therefore held that he had used the correct legal standard after all.

The majority rejected the petitioner's argument that the magistrate's finding was clearly erroneous. The opinion says that the close vote of the department was "substantial evidence" that could not be offset by the evidence of past discrimination (Appendix A, p. 15). The court recognized that the vote itself could be an indication of bias, but it explicitly rejected any duty to investigate a department's decision-making process. "Given the similar research output of two candidates, an experienced faculty committee might - quite rightly - come to different conclusions. It is not our place to question the significance or validity of such conclusions" (Appendix A, p. 14; emphasis added). The majority goes so far as to say "that in a case of this sort, where it is a matter of comparing qualification against qualification, the plaintiff is bound to lose." (Id., emphasis added.)

A dissenting opinion criticizes the majority's absention from inquiring into employment decisions in university settings. After comparing the qualifications of petitioner with her male colleagues, the dissenting judge concludes he would reverse on the basis of a clearly erroneous finding by the magistrate.

The petitioner seeks review of the affirmance of the judgment of the District Court, and outright reversal of the judgment for the respondent. In the alternative, the petitioner seeks remand to the District Court for a consideration of the comparative evidence.

VIII. REASONS FOR GRANTING THE WRIT

(1) A court should not defer to the subjective judgment of an employer when it is determining if an employment decision is discriminatory. Allowing the decision of the Court of Appeals to stand means that in the Seventh Circuit a court will abstain from evaluating an employment decision whenever a subjective judgment is required of the employer, as it is, for example, in a tenure decision. The Seventh Circuit's opinion is in clear conflict with the 1972 amendment to the Civil Rights Act, 42 U.S.C. §2000(e), et. seq., which extended civil rights protection to higher education. The Seventh Circuit's decision is also in conflict with the procedure to be followed in Title VII cases, as established by the Supreme Court and followed in other circuits.

The 1972 amendment to Title VII repealed the exemption granted to higher

education in the original Civil Rights Law of 1964. (The Equal Employment Opportunity Act of 1972, Pub. L. No. 92, 26C, §3; codified at 42 U.S.C. §2000(e)-1.) That Congress specifically intended to grant the protection of the anti-discrimination laws to university professors, and other upper-level employees, is shown by the legislative history.

> The committee believes that it is essential that these employees [in the higher paying and more prestigious positions] be given the same opportunities to redress their grievances as are available to other employees in the other sectors of business. (Sen. Rep. No. 415, Rud. Cong., 1st Sess. 12 (1971)1 cf. H. Rep. No. 238, 92nd Cong., 2d Sess., reprinted at 1972 U.S. Code Cong. & Ad. News, 2137, 2155).

The Court of Appeals for the Seventh Circuit has announced by the decision in this case that it will no longer allow

university professors to succeed in any discrimination action where the employer's subjective judgment is involved in an employment decision. Againt the clear mandate of Congress, the court says that "[i]t is not our place to question the significance or validity" of the conclusions of a faculty committee (Appendix A, p. 14). "Because of the way we have described the problem - the decision-maker is also the source of the qualifications - there may be no solution ... [T]he plaintiff is bound to lose." (Id.) This singular announcement of failure is, because of the way the Court defines the problem, really a refusal to apply the law as Congress intended. But there is no reason why the Court should describe the problem as it does. As the dissenting judge says "I do not see a qualitive distinction between a tenure decision, and any other employment decision." The subjective esteem of

colleagues and supervisors is often the key to any employment decision." (Appendix B, p. 17). The dissenting opinion is the one in accordance with the Supreme Court interpretation of Title VII.

The law often obliges finders of fact to inquire into a person's state of mind. U.S. Postal Service v. Aikens, 460 U.S. at 716. In Aikens, the Court said:

> All courts have recognized that the question facing triers of facts in discrimination cases is both sensitive and difficult. ... But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. (Id.)

In the petitioner's case, both the trial court and the Court of Appeals have treated discrimination differently from other questions of fact. The dissenting opinion shows how the question should be faced - the judge looked at the comparative

evidence and at the evaluations of outside experts to check the validity of the tenure committee's decision. The dissent finds it "difficult to believe that any fact other then sex explains the double-standard applied by the University" and concludes that the employer's proffered reasons is pretextual (Appendix A, p. 29). It is because the dissent follows the "McDonnell-Burdine-Aikens" procedure that the judge is able to carry out the required evaluation of the subjective judgment of the tenure committee. The opinion of the majority in the Appeals Court is nothing more than a sub rosa retreat to an explicit policy of judicial abstention in tenure cases. This policy of abstention has been rejected in most of the circuits. See Powell v. Syracuse University, 580 F.2d 1150,1153 (2nd Cir.),

cert. denied, 439 U.S. 984 (1978).[1] It is because the majority in the Seventh Circuit deviates from the Aikens procedure that it finds itself unable to make that evaluation.

Employment decisions that may discriminate and are based on subjective judgments have been reviewed with great suspicion by courts. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the court rejected an employer's evaluations when they were "extremely vague and fatally open to divergent interpretations ..." (422 U.S. at 433). Numerous lower courts have struggled with the question of how to make

---

1. Kunda v. Muhlenberg College, 621 F.2d 532, 551 (3rd Cir., 1980); Smith v. University of North Carolina, 632 F.2d 316, 345 fn. 26 (4th Cir., 1980); Lynn v. Regents of the University of California, 656 F.2d 1337,1342 (9th Cir., 1980), cert. denied, 459 U.S. 823 (1982); Whiting v. Jackson State University, 616 F.2d 116, 120-121 (5th Cir., 1980); Sweeney v. Board of Trustees, 604 F.2d 106, 108 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980); Carlile v. South Routt School District, 739 F.2d 1496, 1499 (10th Cir. 1984)

such a review.[2] It was out of this struggle that the "McDonnell-Burdine-Aikens" procedure was developed to determine when an employer's proffered reason is pretextual. Even in the rarified atmosphere of the University, a proper determination can be made if the finding is based on comparative evidence, if the correct legal standard is used, and if, as the dissent in the petitioner's case says, the court uses common sense and the help of outside experts to act as its guide.

---

2. Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir., 1972); Watkins v. Scott Paper Co., 530 F.2d 1159, 1188-90 (5th Cir.), cert. denied, 429 U.S. 861 (1976); Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir., 1980), cert. denied, 101 S.Ct. 3083 (1981); Chanee v. Board of Examiners, 458 F.2d 1167 (2d Cir., 1972); Senter v. General Motors Corp., 532 F.2d 511, 528, 30 (6th Cir.), cert. denied, 429 U.S. 870 (1976); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir.), cert. denied, 409 U.S. 982 (1972); Powell v. Syracuse University, 580 F.2d 1150 (2d Cir.), cert. denied, 439 U.S. 984 (1978); Sweeney v. Board of Trustees, 569 F.2d 169, 176 (1st Cir.), vacated and remanded per curicum, 439 U.S.

(2) At the third stage of a Title VII discrimination suit the legal standard is whether the plaintiff has met her burden of proving that the employer's explanation is "not the true reason for the employment decision." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Once the defendant produces a reason for the employment decision, "the fact-finder must then decide whether the rejection was discriminatory within the meaning of Title VII." U.S. Postal Service v. Aikens, 460 U.S. 711, 715 (1983). In the present case, the magistrate also failed to balance the petitioner's arguments against the respondent's proffered reason. Instead, the magistrate concentrated on only the respondent's explanation. This explanation, the magistrate concluded, was reasonable and not arbitrary. However, this

---

(cont.)
24 (1978).

is a procedure and a legal standard better suited to the review of an administrative agency's action, than it is to fairly decide a court trial on a civil rights violation. The magistrate failed to follow the "McDonnell-Burdine" procedure to determine if the employer's reason was in fact a pretext.

The Court of Appeals recognized that it would have been a legal error for the magistrate to use a standard of reasonable and not arbitrary. But the Court decided that he did apply the correct standard based on its conclusion that the magistrate did consider the comparative evidence. The opinion reads:

> The magistrate compared [Namenwirth's] record with the record of men who were awarded tenure and determined that the claim that the Department - and the University - found insufficient promise in Namenwirth's work was not pretextual." (Appendix A, p. 13).

This is simply wrong. The magistrate made no finding of fact on the comparative records of Namenwirth and her male colleagues. Instead, he rejected such evidence as not material or relevant. The magistrate also did not use comparative evidence to ground his determination that the employer's reason was not pretextual. Instead, his stated grounds are that he found the decision reasonable and not arbitrary. The Court of Appeals' justification for the magistrate's legal procedure is completely untenable. The petitioner asks that the Supreme Court correct the errors of the Court of Appeals on the procedure and legal standard to be used in a Title VII case.

(3) The plaintiff in a Title VII discrimination case must be allowed a fair opportunity to present comparative evidence of treatment between the plaintiff and other employees. This is because the plaintiff must have a full and fair opportunity to

demonstrate that the proffered reason for an employment decision is in fact a pretext. McDonell-Douglas v. Green, 411 U.S. 792, 804 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983). The ultimate burden of showing discrimination means showing that the employer is treating an employee less favorably than others because of her sex. Furnco Construction Corp. v. Waters, 435 U.S. 567, 577 (1978); citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 355, fn. 15 (1977). Comparative evidence of an employer's treatment of the plaintiff and other employees is relevant, and may be necessary, to prove discrimination. U.S. Postal Service v. Aikens, 460 U.S. at 714, fn. 2. Therefore, a plaintiff who is not allowed to present comparative evidence of employer

treatment of classes of employees has been denied a fair opportunity to demonstrate that an employer's proffered reason is a pretext.

A plaintiff in a Title VII action may succeed by either persuading the court that: 1) a disciminatory reason motivated the employer; or by 2) showing that the employer's proffered explanation is unworthy of credence. Burdine, 450 U.S. at 456. As in any lawsuit, the plaintiff may prove her case by direct or circumstantial evidence. Aikens, 460 U.S. at 714 n. 3. Comparative evidence bears on the ultimate facts at issue insofar as it shows the Court that a discriminatory motive more likely motivated the employer, or insofar as it shows that the proffered explanation is unworthy of credence. A court presiding over a non-jury trial has an obligation to make findings on all ultimate facts so as to preserve the record on review. Fed. R.

Civ. P. 52(a). Where a court omits from its decision numerous proposed findings of fact on comparative evidence, and these proposed findings do relate to the ultimate facts at issue, then the court is denying a fair opportunity to the plaintiff to demonstrate that the employer's proffered reason is in fact a pretext.

The magistrate rejected over one hundred and fifty proposed findings of fact under the petitioner's most likely motivated approach to proving discrimination. He did make a finding that women have been underrepresented at the University of Wisconsin (Appendix B, Findings 39-48, pp. 12-14; as of 1978, 6 of 323 tenured professors in science departments were women). However, the court rejected a vast amount of credible evidence on the treatment of Ms. Namenwirth and her male colleagues in the tenure process, and on the behavior and discriminatory history of the

respondent. This evidence was comparative in that much of it focused on the disparate treatment accorded Ms. Namenwirth: it did not address the substance of the employer's reason for the tenure denial. The magistrate rejected this comparative evidence as not "genuinely relevant or material", because he was examining only the respondent's proffered reason (Appendix B, p. 2). By rejecting comparative evidence of disparate treatment when examining the respondent's reason, the court denied the petitioner a full and fair opportunity to present evidence that the employer's reason was pretextual.

The petitioner also proposed numerous findings of fact to show that the employer's explanation was unworthy of credence. The magistrate rejected thirty-six proposed findings that compared the research and research potential of Namenwirth with her male colleagues. The court failed to make

any comparison between the tenure candidates on their research qualifications to see if in fact the employer's proffered reason for its employment decision was worthy of credence. The court's basis for refusing to make a finding on these qualifications was that there is a subjective element in the decision-making process (cf. Appendix B, Finding 20, p. 7). The petitioner believes that where she was the only woman in thirty-five years to be considered for tenure and the only person ever to be rejected, then comparative evidence would show that the respondent's proffered reason is unworthy of credence.

The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination. Furnco Construction Corp. v. Waters, 438 U.S. at 578. The Court of Appeals ruled that even though the magistrate failed to make any findings on

the comparative issues, the magistrate had "considered" the evidence. The petitioner contends "consideration" is not sufficient. It was a error for the trial court to have excluded findings of fact on comparisons from its decision.

The Court of Appeals believed that the trial court had considered the comparative evidence, despite its failure to make any findings on the issues. It based its belief on the magistrate's use of the word "arbitrary".

> A motive which is applied in some cases and not in others, not along lines of principle ..., is arbitrary, and we cannot imagine what the magistrate would have meant by the use of the word if he did not mean that the University's standards of excellence were applied to all equally." (Appendix A, p. 11).

This is a disingenuous interpretation of the magistrate's decision. Arbitrary

means capricious - unconstrained by any principle. Not arbitrary means not capricious: the word cannot be extended to mean that there was no deviation from the principle of equality. Putting the magistrate's words in context shows that he really meant a "reasonable decision .. which I cannot reject as arbitrary," to clarify that he found the reason to be "the true and genuine basis" for the employer's decision (Appendix B, p. 26). A reason can be reasonable, true, genuine, not arbitrary and still be pretextual. As the Court of Appeals itself notes, a reason can be all of these and still be used in a discriminatory manner (Appendix A, p. 9). This is an exact description of the situation that is presented to the Supreme Court today.

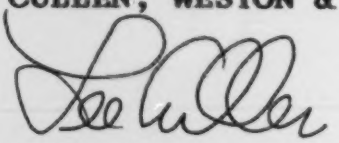
IX. CONCLUSION

For the reasons stated herein, the writ of certiorari should be granted.

Dated this 31st day of October, 1985.

Respectfully submitted,

CULLEN, WESTON & PINES



Lee Cullen
Attorney for Petitioner

20 North Carroll Street
Madison, WI 53703
(608)251-0101